



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

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June 27, 1994

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William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Hand-Delivered

Re: In the Matter of Implementation of Sections
3(n) and 332 of the Communications Act,
Regulatory Treatment of Mobile Services,
GN Docket No. 93-252

Dear Secretary Caton:

Enclosed please find an original and four (4) copies of
the Response of the Pennsylvania Public Utility Commission to
Oppositions to Petition for Reconsideration.

Sincerely,

Maureen A. Scott
Assistant Counsel

MAS/ms

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF SECRETARY

In the Matter of:)
)
Implementation of Sections 3(n))
and 332 of the Communications Act) GEN Docket No. 93-252
)
Regulatory Treatment of Mobile)
Services)

RESPONSE OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules, the Pennsylvania Public Utility Commission ("PaPUC") hereby files its Response to the oppositions to its Petition for Reconsideration.

Several parties oppose the PaPUC's request for a specific provision in the FCC rules allowing state access to the information required to support a petition, if necessary, before the FCC.¹ The arguments presented, however, are entirely without merit and should be rejected by the FCC. Paradoxically, while first acknowledging that Section 332(c)(3) of the statute specifically places the burden of proof upon the states to demonstrate market conditions which require state rate regulation, the CTIA turns around and opposes making the required information available to the state to meet its burden of proof. CTIA then goes on to argue that states do not need internal firm data to determine if there has been

¹See, Oppositions/Comments to Petitions for Reconsideration of the Cellular Telecommunications Industry Association, p. 14; Opposition of the Bell Atlantic Companies to Petitions for Reconsideration, pp. 17-18.

market failure necessitating state rate regulation since symptoms of market failure should be readily discernible and will be readily brought to the state's attention by dissatisfied consumers. To the contrary, PaPUC's request for modification was premised upon the fact that there will be instances when the information required to support a petition may only be available through the CMRS provider itself. Indeed, the demonstrations required under the rules are very specific and will require the state to have access to data not in the hands of the general public or other agencies including the FCC. Examples under the rules include, inter alia, the following information:

"(2) The number of customers of each such provider, and trends in each provider's customer base during the most recent annual period (or other reasonable period if annual data is not available), and annual revenues and rates of return for each such provider.

(3) Rate information for each CMRS provider, including trends in each provider's rates during the most recent annual period (or other reasonable period if annual data is not available).

.

(7) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, imposed upon CMRS subscribers. Such evidence should include an examination of the relationship between rates and costs."²

Such information is not reasonably likely, especially in the absence of a federal tariffing requirement, to be available to

²In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, Adopted: February 3, 1994; Released: March 7, 1994.

anyone but the CMRS provider itself, and is certainly not information that is either "readily discernible" or that can "readily brought to their [the state's] attention by dissatisfied consumers."

As is already apparent through the arguments of CTIA and others, PaPUC anticipates that some CMRS providers will refuse to provide the information required by the rules on the grounds that the state has no jurisdiction over the rates of CMRS service. However, the clear intent of both the Act and the FCC rules is that a state have access to the information necessary to support a state petition. An express provision in the rules may head off disputes which may otherwise arise over a state's entitlement to this information.

Contrary to the assertions of some, the PaPUC is not asking the FCC for carte blanche authority through its rules to engage in an ongoing open-ended information gathering process.³ Rather, the PaPUC's request is specifically directed to the information required by the statute and the Commission's rules and would only be used by the PaPUC when it has received information through other sources that there has been a market failure.

Ironically, some of the parties which are now opposing the PaPUC's request, are the same parties which actively supported adoption by the Commission of the specific requirements discussed above. These parties having actively supported the adoption of very specific and detailed showings by states cannot now turn

³See, Opposition of Bell Atlantic, p. 17.

around and attempt to deny the states access to the very information necessary to fulfill those requirements.

Finally, at least one other party argues that such a provision would be undesirable since the information requested by the state may then become available to its competitors. Most state laws, including Pennsylvania's, however, have provisions permitting "confidential" or "proprietary" treatment of "trade secret" information. In summary, in accordance with the requirements of the statute and FCC rules, the FCC should include an express provision in its rules allowing state access to information required to make the requisite demonstration of need under federal law.

Others oppose the PaPUC's request for reconsideration of the rule which would allow parties in all cases to request suspension of state regulation in 18 months.⁴ PCIA argues that given rapidly advancing technology and the imminent advent of six providers in each service area, the 18 month period is needed as a "safety valve" if developments warrant suspension of state regulation earlier than initially authorized by the Commission. PCIA's argument, however, ignores the safeguards already built into the Commission's rules. The FCC will, on a case-by-case basis authorize the specific state regulations only for the specified period of time it finds necessary to "ensure that rates will be neither unjust nor unreasonably discriminatory." Certainly, the

⁴See, Opposition of Personal Communications Industry Association ("PCIA"), p. 3.

Commission will take into account technology and the likelihood of further competition, at the time it authorizes the state regulations. While the PaPUC supports the 18 month rule as a general safeguard against premature and unwarranted requests by parties for suspension of state rate regulation, the PaPUC does not believe the 18 month rule should apply in instances when the FCC specifically determines, based upon the facts of the case, that state regulation is necessary for a period exceeding 18 months.

Others oppose both NARUC's and the PaPUC's request for reconsideration of the rule which would require a state to identify and provide a detailed description of the specific rules that it would establish if the Commission were to allow the states to regulate CMRS rates.⁵ However, nothing in the statute requires a state to submit the equivalent of proposed or final rules to the FCC before being allowed to petition to rate regulate CMRS providers. As explained by the PaPUC in its Petition for Reconsideration, such a requirement could create unnecessary and unreasonable procedural hurdles for a state to overcome before being able to file its petition or implement rate regulation, as the case may be. For this reason, the PaPUC requests that the FCC clarify how it intends this provision of the new rules to work.

Finally, both Bell Atlantic and PCIA oppose the PaPUC's

⁵See, Opposition to Petitions for Reconsideration of NYNEX, p. 5; Opposition of the Bell Atlantic Companies to Petitions for Reconsideration, pp. 18-19; Opposition to Petitions for Reconsideration of McCaw Cellular Communications, p. 18; Oppositions/Comments to Petitions for Reconsideration of the Cellular Telecommunications Industry Association; pp. 12-13.

request for reconsideration of the FCC's interpretation of the statutory criteria for determining whether state rate regulation is appropriate.⁶ Under well-established case law, the FCC may not interpret a statute literally when to do so would render a portion of the statute superfluous. The FCC's interpretation would render the first criteria of the statute superfluous. While most parties, including the FCC rely upon the legislative history of the Act, which is appropriate when the statute is ambiguous on a face, the PaPUC does not believe that the legislative history is entirely clear on this point. In fact, the House and Senate Reports taken together would support the interpretation that a state need only meet one of the criteria in its petition for state rate regulation.

⁶See, Opposition of the Bell Atlantic Companies to Petitions for Reconsideration, pp. 17-18; Opposition of Personal Communications Industry Association, pp. 1-2.

For the foregoing reasons, the PaPUC urges the Commission to grant its Petition for Reconsideration and reject the oppositions to it discussed above.

Respectfully submitted,


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